JULIA A. OLSON (OR Bar 062230)
JuliaAOlson@gmail.com
WILD EARTH ADVOCATES
1216 Lincoln Street
Eugene, OR 97401
Tel: (415) 786-4825

DANIEL M. GALPERN (OR Bar 061950)
dan.galpern@gmail.com
LAW OFFICES OF DANIEL M. GALPERN
2495 Hilyard Street, Suite A
Eugene, OR 97405
Tel: (541) 968-7164

JOSEPH W. COTCHETT
jcotchett@cpmlegal.com
PHILIP L. GREGORY (*pro hac vice*)
pgregory@cpmlegal.com
PAUL N. MCCLOSKEY
pmccloskey@cpmlegal.com
COTCHETT, PITRE & McCARTHY, LLP
San Francisco Airport Office Center
840 Malcolm Road
Burlingame, CA 94010
Tel: (650) 697-6000
Fax: (650) 697-0577

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

KELSEY CASCADIA ROSE JULIANA; **XIUHTEZCATL TONATIUH M.**, through his Guardian Tamara Roske-Martinez; et al.

Plaintiffs,

v.

The UNITED STATES OF AMERICA; **DONALD TRUMP**, in his official capacity as President of the United States; et al.,

Federal Defendants.

Case No.: 6:15-cv-01517-TC

PLAINTIFFS' RESPONSE TO INTERVENOR DEFENDANT AMERICAN FUEL & PETROCHEMICAL MANUFACTURER'S MOTION TO WITHDRAW

TABLE OF CONTENTS

Page

BACKGROUND **2**

I. Intervenor Defendant AFPM's Intervention **2**

II. Intervenor Defendants' involvement in this case has complicated and prolonged the litigation to the detriment of this Court and Plaintiffs **4**

a. Intervenor Defendants' motion to dismiss and motion to certify order for interlocutory appeal required substantial additional briefing by Plaintiffs **5**

b. Intervenor Defendants refused this Court's multiple requests to narrow the issues as to the allegations in the complaint admitted by Federal Defendants **6**

c. Intervenor Defendants' refusal to respond to any discovery placed a significant burden on Plaintiffs and this Court **12**

ARGUMENT **13**

I. AFPM seeks to avoid its obligations as a party in the case and must provide a justification to the Court in support of its desire to withdraw **13**

II. Intervenor Defendants' withdrawal should be conditioned in a manner that does not prejudice Plaintiffs **14**

a. AFPM's withdraw from the case should be with prejudice **18**

b. This Court should condition AFPM's withdrawal upon AFPM's dismissing of all its pending motions and objections **24**

c. In addition to allowing AFPM's withdrawal only with prejudice and AFPM's dismissal of all its motions and objections, this Court should place other terms and conditions on AFPM's withdrawal from this case **25**

i. This Court has the inherent power to order an award of attorneys' fees to Plaintiffs, given Intervenor Defendants' conduct in this case **26**

ii. This Court has the power to preclude AFPM and its members from attempting to further litigate the claims in this case.......29

CONCLUSION 31

TABLE OF AUTHORITIES

Page(s)

CASES

Alliance for Global Justice v. District of Columbia,
2005 U.S. Dist. LEXIS 2855 (D.D.C. Feb. 7, 2005) 31

Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,
421 U.S. 240 (1975) 27

Beaudry Motor Co. v. Abko Properties, Inc.,
780 F.2d 751 (9th Cir. 1986) 27, 28

Briles v. Loomis Group, Inc.,
CIV. 08-1290-AA, 2009 WL 563048 (D. Or. Mar. 3, 2009) 28

Brooks v. State Bd. of Elections,
173 F.R.D. 547 (S.D. Ga. 1997) 19

Brown v. Detzner, No. 3:12-cv-00852,
Dkt. 58 (M.D. Fla. Apr. 29, 2013) 16

Burnette v. Godshall,
828 F.Supp. 1439 (N.D. Cal. 1993) 18, 25

Burnette v. Lockheed Missiles & Space Co., Inc.,
72 F.3d 766 (9th Cir. 1995) 18, 25

Chambers v. NASCO, Inc.,
501 U.S. 32 (1991) 28

Chesapeake Energy Corp. v. Bank of NY Mellon Trust Co.,
No. 1:13-cv-01582, Dkt. 60 (S.D.N.Y. Apr. 1, 2013) 15, 16

Chicago, R.I. & P.R. Co. v. Schendel,
270 U.S. 611 (1926) 30

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990) 21

Dowell v. Bd. of Educ. of Okla. City Pub. Sch.,
430 F.2d 865 (10th Cir. 1970) 15, 16

Ellis v. Merrill Lynch & Co.,
Civil Action Nos. 86-2865, 86-3375, 1989 U.S. Dist. LEXIS 14720 (E.D. Pa. Dec. 6, 1989).31

Goldlawr, Inc. v. Shubert,
32 F.R.D. 467 (S.D.N.Y 1962)....................20, 25

Goodyear Tire & Rubber Co. v. Haeger,
137 S. Ct. 1178 (2017)....................26, 27

Greene v. United States,
996 F.2d 973 (9th Cir. 1993)....................2, 20, 32

Hall v. Cole,
412 U.S. 1 (1973)....................27

Hargis v. Foster,
282 F.3d 1154 (9th Cir. 2002)....................18

Headwaters Inc. v. U.S. Forest Serv.,
399 F.3d 1047 (9th Cir. 2005)....................29

Hemstreet v. Duncan,
No. CIV. 07-732-ST, 2008 WL 2167137 (D. Or. May 21, 2008)....................18, 19

Int'l Union of Petroleum & Indus. Workers v. W. Indus. Maintenance, Inc.,
707 F.2d 425 (9th Cir. 1983)....................28

Koch v. Hankins,
8 F.3d 650 (9th Cir.1993)....................28

Kourtis v. Cameron,
419 F.3d 989 (9th Cir. 2005)....................15

Legal Aid Society of Alameda County v. Dunlop,
618 F.2d 48 (9th Cir. 1980)....................17

Mine Workers v. Bagwell,
512 U.S. 821 (1994)....................26

Montana v. United States,
440 U.S. 147 (1979)....................30

N.W. Envtl. Def. Ctr. v. Allen,
CIV. 05-1279-AA, 2007 WL 1746333 (D. Or. June 13, 2007)....................25

Opperman v. Path, Inc.,
No. 13-cv-00453-JST, 2015 U.S. Dist. LEXIS 171564 (N.D. Cal. Dec. 22, 2015)....................31

Radian Asset Assur., Inc. v. College of the Christian Bros. of New Mexico,
274 F.R.D. 683 (D.N.M. 2011) 20

Richards v. Jefferson Cnty.,
517 U.S. 793 (1996) 29

Rodriguez v. U.S.,
542 F.3d 704 (9th Cir. 2008) 28

Santa Rosa Meml. Hosp. v. Kent,
15-16650, 2017 WL 1488263 (9th Cir. Apr. 26, 2017) 28

South Carolina v. United States,
No. 1:12-cv-00203 (D.D.C. May 24, 2012) 16

Taylor v. Sturgell,
553 U.S. 880 (2008) 15, 29, 30, 31

United States v. Oregon,
839 F.2d 635 (9th Cir. 1988) 2

United States v. Outboard Marine Corp.,
789 F2d 497 (7th Cir.1986) 20

United States v. Standard Oil Co.,
603 F.2d 100 (9th Cir. 1979) 27

Williams v. Peralta Community College Dist.,
227 F.R.D. 538 (N.D. Cal. 2005) 18, 19, 28

OTHER AUTHORITIES

1 Restatement (Second) of Judgments § 39, cmt. a (Am. Law Inst. 1980) 30

18A Charles Alan Wright et al., Federal Practice and Procedure § 4454 (2d ed. 2017) 30

RULES

Federal Rules of Civil Procedure

Rule 41 ....17, 18, 19, 25

In November 2015, three trade associations — the American Fuel & Petrochemical Manufacturers ("AFPM"), American Petroleum Institute ("API"), and National Association of Manufacturers ("NAM") — moved to intervene in this case as full party defendants to protect the interests of their members. They argued, and this Court agreed, that the relief Plaintiffs seek could directly harm the economic interests in the production, refining and use of fossil fuels of "virtually the entire swath of the NAM, AFPM, and API's members." Memo in Support of Mot. to Intervene ("Mot. to Intervene"), ECF 15, at 16.

Eighteen months later, on the due date of its required responses to Plaintiffs' Requests for Admissions, AFPM completely reversed its position and moved this Court for permission to withdraw from this case without providing any justification for its request to withdraw. AFPM argues it has the full discretion to join and leave this case as a party without any explanation and without any consequences.

Plaintiffs do not outright oppose AFPM's withdrawal from this case. However, Plaintiffs believe such withdrawal should only be granted with conditions. There are several reasons why AFPM's withdrawal should be conditioned in a manner that does not prejudice Plaintiffs or the continued prosecution of this case: the excessive delay caused by AFPM's participation in this case, the late date of AFPM's motion to withdraw, Plaintiffs' investment of considerable resources in addressing issues raised by AFPM, and the apparent squandering of judicial resources. In permitting AFPM to withdraw, this Court should order the following:

(a) AFPM's withdrawal should be with prejudice, finding that AFPM no longer meets the requirements of Rule 24;

(b) AFPM's withdrawal should include the dismissal of all pending AFPM motions and objections in this case;

(c) AFPM should be required to pay attorneys' fees and costs of counsel for Plaintiffs that are attributed to AFPM's participation in this case;

(d) Because AFPM seeks to withdraw long after motion practiced commenced, the legal determinations made to date should have a *stare decisis* effect on AFPM's interest or available remedies in other litigation. *United States v. Oregon*, 839 F.2d 635, 638–39 (9th Cir. 1988); *Greene v. United States*, 996 F.2d 973, 977–78 (9th Cir. 1993); and

(e) AFPM and its members should be precluded from participating in this case as parties. As a result, AFPM should file with this Court a list of its members, both at the time AFPM moved to intervene and at the time AFPM moved to withdraw. Both AFPM and each of these members should be precluded from making any future filings in this case absent leave of this Court, which leave should only be granted if AFPM or such member presents evidence as to its role, if any, in the decision to intervene, the decision to admit or deny allegations in the First Amended Complaint, the various decisions to respond to discovery, and the decision to withdraw. Further, any future filing by AFPM or its members should be limited to *amicus curiae* participation if the foregoing conditions are met.

BACKGROUND

I. Intervenor Defendant AFPM's Intervention

Along with the other Intervenor Defendants, AFPM vigorously argued for the right to intervene in this case on behalf of its members "to ensure that the abrupt and extraordinary policy mandates that Plaintiffs ask this Court to direct are not imposed on their members and the entire U.S. economy through this case." Mot. to Intervene, ECF 15, at 2. According to the moving papers, it was the interests of AFPM's members, not of the trade association itself, which was used to justify intervention. *See* Mot. to Intervene, ECF 15, at 2–3, 6–7; Declaration of David Friedman of American Fuel & Petrochemical Manufacturers in Support of Motion to Intervene ("Friedman Decl."), ECF 18, ¶¶ 2, 8, 10, 16.

Along with API and NAM, AFPM argued: "if Plaintiffs succeed in this Court ordering the elimination or massive reduction of U.S. conventional fuel consumption and manufacturing processes that emit GHGs beyond existing federal and other regulations, the ***members*** of each of the Proposed Intervenor-Defendants will be harmed." Mot. to Intervene, ECF 15, at 2–3 (emphasis added).

> AFPM is a national trade association that represents corporations that own and operate over 95 percent of the United States' domestic petroleum refining capacity. AFPM members are large energy consumers who would be impacted directly by the outcome of this litigation. AFPM member companies manufacture gasoline, diesel fuel, home heating oil, jet fuel, asphalt, and the petrochemicals that serve as "building blocks" in thousands of products used every day by consumers and businesses, including plastics, clothing, medicine and computers.

Mot. to Intervene, at 6–7 (citations omitted); *see* Friedman Decl. ¶¶ 7, 9–10.

AFPM argued that the remedy Plaintiffs seek may directly and severely impact AFPM's members because it "is a direct threat to AFPM's members' businesses," due to "an increase in the cost of producing transportation fuels, petrochemicals, and other products manufactured by AFPM members." Mot. to Intervene, at 3; *see* Friedman Decl. ¶¶ 8–19.

Plaintiffs opposed AFPM's participation in this case as full party intervenor defendants. Plaintiffs' Opp. to Mot. to Intervene, ECF 33. For instance, Plaintiffs argued AFPM's "asserted interests are so tenuous, generally alleged, and unrelated to the present action" and were instead based on its "members' fears of sometime in the future needing to use alternative energy sources, reshape their fossil-fuel related businesses, or shut down operations." *Id.* at 5–6. Plaintiffs further argued that, if intervention was granted, AFPM, API, and NAM's participation should be limited to participating in the remedy phase of the case. *Id.* at 18.

This Court found that all of the factors for intervention had been met and granted the motion to intervene as of right. Order Granting Mot. to Intervene, ECF 50. This Court concluded that Intervenor Defendants have a protectable interest because, if Plaintiffs prevail, "this action will directly change the nature of many of the ***members***' business or how they carry out their business." *Id.* at 6 (emphasis added). This Court also found "[t]here is no question that the interests of proposed intervenors would be impaired" by Plaintiffs' requested remedy. *Id.* at 7. Finally, this Court decided the interests of Federal Defendants were much broader than the interests of Intervenor Defendants, and Federal Defendants would not adequately represent the interests of Intervenor Defendants. *Id.* at 7–8.

II. Intervenor Defendants' involvement in this case has complicated and prolonged the litigation to the detriment of this Court and Plaintiffs

In addition to the briefing and oral argument on the Motions to Intervene, to Dismiss, and to Certify for Interlocutory Appeal, both this Court and Plaintiffs have expended substantial resources responding to Intervenor Defendants' participation in the case, both by attempting to engage in discovery concerning Intervenor Defendants and through motion practice. Since January 2017, Plaintiffs have expended significant resources addressing Intervenor Defendants' arguably sanctionable Answer, as well as propounding requests for admissions, serving and narrowing requests for production of documents, and conferring on deposition notices, in order to narrow the issues for trial and to obtain documents relevant to Intervenor Defendants' position on climate change. Plaintiffs have had numerous email exchanges, telephonic meet and confers, and an all-day in-person meet and confer with Intervenor Defendants. Now, after months of what is ultimately proving to have been a waste of time and resources by this Court and Plaintiffs, and with serving only objections to all discovery requests, each Intervenor Defendant seeks this Court's permission to withdraw from the case. From the perspective of judicial economy, no party in litigation should be allowed to waltz away from a case after squandering the time and energy of this Court and Plaintiffs. Withdrawal after such conduct should be coupled with repercussions.

a. Intervenor Defendants' motion to dismiss and motion to certify order for interlocutory appeal required substantial additional briefing by Plaintiffs

After moving to intervene, Intervenor Defendants spent 10 months briefing and arguing their motion to dismiss, which was denied in its entirety on November 10, 2016. At the motion to dismiss stage, the arguments of Intervenor Defendants essentially duplicated arguments made by Federal Defendants, and raised the political question doctrine defense, which even Federal Defendants did not make. ECF 20. On February 2, 2016, Plaintiffs had to file a 29-page brief in opposition to Intervenor Defendants' Motion to Dismiss. ECF 56. Thereafter, on March 9, 2016, Plaintiffs had to prepare for and oppose oral arguments made by Intervenor Defendants before this Court. On May 16, 2016, Plaintiffs opposed Intervenor Defendants' objections to this Court's Findings and Recommendations on the Motions to Dismiss. ECF 76. Thereafter, on September 13, 2016, Plaintiffs prepared for and addressed oral argument before Judge Aiken.

In the past two months, Plaintiffs have opposed the complicated Motion to Certify filed by Intervenor Defendants, as well as Federal Defendants' motions for expedited review and stay, in which Intervenor Defendants joined. On April 3, 2017, Plaintiffs filed their opposition to Intervenor Defendants' Motion to Certify Order for Interlocutory Appeal. ECF 132. On April 4, 2017, Plaintiffs filed their opposition to Defendants' Motion to Stay. ECF 134. On May 23, 2017, Plaintiffs filed their response to objections to this Court's Findings and Recommendations on the Motion to Stay. ECF 165. On May 26, 2017, Plaintiffs opposed Intervenor Defendants' objections to this Court's Findings and Recommendations on interlocutory appeal. ECF 168.

b. Intervenor Defendants refused this Court's multiple requests to narrow the issues as to the allegations in the complaint admitted by Federal Defendants

As this Court is well aware, Intervenor Defendants repeatedly resisted this Court's multiple requests to state their position on allegations admitted by Federal Defendants. This motion is the latest (and hopefully last) example of this refusal to take a position.

Intervenor Defendants were required to answer Plaintiffs' First Amended Complaint ("FAC") by November 28, 2016. Upon Intervenor Defendants' motion, this Court granted an extension of time to answer to December 15, 2016, so that Intervenor Defendants could address what they termed "complicated allegations" in Plaintiffs' FAC. ECF 87, 91. In advocating for their requested extension of time, counsel for Intervenor Defendants represented to this Court:

> This is an extraordinarily long complaint with a number of very detailed allegations going back almost over the last — well, for more than a century, and it does take some time to respond to those allegations in a thoughtful manner and to compile all the information necessary to answer them.

November 28, 2016 Status Conference Transcript, ECF 100, at 5:1–6.

Notwithstanding this representation and the resulting extension, the Answer finally filed by Intervenor Defendants claimed a lack of sufficient information or knowledge to admit or deny 198 paragraphs containing factual allegations in the FAC, in essence refusing to take a position on over 75% of Plaintiffs' factual allegations.[1] On January 13, 2017, Federal Defendants made numerous important admissions in their Answer that drastically lessened the scope of discovery. Promptly thereafter, both this Court and Plaintiffs made numerous attempts to determine the position of Intervenor Defendants on these admissions in order to determine the scope of issues for discovery and trial.

---

[1] 259 paragraphs in the FAC contain factual allegations. Intervenor Defendants admit only 47 partial or complete paragraphs. They specifically deny only 14 paragraphs. ECF 93.

At the status conference on February 7, 2017, this Court laid out the importance of the issue:

> To summarize, the government has admitted that, yes, climate change is a reality and that, yes, it's induced by human activity, and they admit that CO_2 right now is at a level of 400 parts per million, which exceeds the level — is the highest level in millions of years. So a number of the allegations made by the plaintiffs in their complaint are admitted by the government.
>
> The intervenors' answer, on the other hand — basically the mantra of the intervenors' answer is we don't know, and on that basis we deny. We don't know what's going on. We don't know if it's climate change or not. We don't know if it's human induced or not.
>
> So to what extent does the government's admissions control where we go in this case? The intervenors in your proposed schedule indicate that they don't intend to do any fact discovery.
>
> Does that mean, then, that the intervenors essentially are not going to contest the government's admissions?
>
> So are you going to ride the government's coattails, so to speak, in this litigation?
>
> Are you going to set out and attempt to controvert some of the government's admissions?
>
> So that's going to be a big help in terms of how we manage this discovery to find out what the intervenors intend to do.

ECF 115, at 14–15.

Intervenor Defendants' counsel responded in part, "it really is beside the point whether the intervenors concede or contest the factual underpinnings of the plaintiffs' case." *Id.* at 16. This Court continued the line of questioning: "let's just take a small example, do the intervenors acknowledge that the CO2 levels in the atmosphere are currently at 400 PPM? Do you deny that, or do you not know?" *Id.* at 16–17. Counsel for Intervenor Defendants responded: "I would say that as we said in our answer, we don't know." *Id.* at 17.

As a result of agreements reached at this status conference, Plaintiffs spent substantial time developing a summary of Federal Defendants' admissions in their Answer to the FAC. On February 15, 2017, Plaintiffs provided Intervenor Defendants with both that summary and relevant core facts from their clients and their clients' members that would assist with addressing Intervenor Defendants' position on Federal Defendants' admissions. ECF 155, ¶ 2. Believing that counsel for Intervenor Defendants contravened Rule 11's requirements in their Answer by denying nearly all of Plaintiffs' factual allegations without a reasonable inquiry into the knowledge of Intervenor Defendants and their members, on February 15, 2017, Plaintiffs also served counsel for Intervenor Defendants with a draft Rule 11 motion. In the draft Rule 11 motion, Plaintiffs provided Intervenor Defendants with evidence of knowledge of each trade association, and their members, on the factual allegations of climate change, in an effort to compel Intervenor Defendants to specifically admit or deny the allegations. Decl. of Julia Olson Supporting Pls.' Resp. to NAM's Mot. to Withdraw, ECF 170-1, ¶ 2. AFPM has neither subsequently admitted nor denied Plaintiffs' allegations.

As Plaintiffs stated in their March 7, 2017 Status Report:

> The February 15 letter pointed out that the Intervenor Defendants claimed a "lack of sufficient knowledge to admit or deny": (1) factual allegations regarding the content of publicly available documents cited in the First Amended Complaint that can be accessed by a simple internet search; (2) factual allegations long known by, and previously admitted by, the Intervenor Defendants and/or their members as established by the Intervenor Defendants and/or their members' own documents and records; and (3) factual allegations that could be admitted with slight alterations in the averments, as the Federal Defendants did in their answer. The February 15 letter asserted "Intervenor Defendants failed to conduct a 'reasonable and competent inquiry' in the course of preparing their answer to the First Amended Complaint in violation of Rule 11." The February 15 letter was accompanied by a draft of legal and factual arguments and exhibits constituting

> evidence of the Intervenor Defendants' knowledge of the factual allegations in Plaintiffs' First Amended Complaint.
>
> In prior meet and confers regarding discovery, and in a discussion with Mr. Volpe at the courthouse on February 7, counsel for Plaintiffs stated their belief that the answer of the Intervenor Defendants regarding insufficient knowledge or information to many of the factual allegations to be incorrect given the wealth of knowledge that the Intervenor Defendants have had for decades, including their own independent scientific research, on climate change.
>
> Despite their promise to confer further with Plaintiffs' counsel regarding these issues and their plea of ignorance about climate matters, there has been no attempt by counsel for the Intervenor-Defendants to confer on this issue since the February 7 Status Conference. Plaintiffs have not received any substantive response to the February 15 letter, as well as Plaintiffs' repeated requests that the Intervenor Defendants substantively respond to the factual allegations and inform Plaintiffs' counsel if the Intervenor Defendants intend to dispute those facts, particularly those admitted by the Federal Defendants.

ECF 119, at 3.

During the March 8, 2017 status conference, Intervenor Defendants complained that Plaintiffs' summary of Federal Defendants' admissions was too extensive and "not helpful." ECF 124 at 40–41. Because Intervenor Defendants continued to refuse to take a position on the allegations, Plaintiffs agreed to serve requests for admissions on Intervenor Defendants, narrowing the list of Federal Defendants' admissions. *Id*. at 43. Plaintiffs served these RFAs on March 24, 2017.

At the status conference on April 7, 2017, this Court again expressed concern about the scope of the issues for pre-trial and trial and asked when Intervenor Defendants would respond to Plaintiffs' RFAs. ECF 143, at 16. Counsel for Intervenor Defendants stated that they had until the end of April and should be responding to that discovery "soon." This Court declared the response would "probably help us figure out how to get this case more focused." ECF 143, at 17. Counsel for Intervenor Defendants inquired why the position of Intervenor Defendants "is relevant to any issue." *Id.*

The Court explained why these responses are relevant to the case:

> [I]f I were trying this case as the trial judge, I would be wondering, you know, what is your position about human-induced climate change. Is it consistent with the government? Is it contradictory to the government's position? Do you intend — you indicate in the status report that you view the role of the intervenors to be that of offering expert testimony in the case. Expert testimony on what subject? What position are your experts going to take that's relevant to this case?

ECF 143, at 17–18.

On April 20, 2017, this Court went so far as to order Intervenor Defendants to electronically file their responses to Plaintiffs' RFAs. ECF 142.

On April 24, 2017, Intervenor Defendants sought their initial extension to respond to the RFAs. After the meet and confer on Intervenor Defendants' request for this extension, and based on agreement from counsel for Intervenor Defendants that they would come to the May 4 in-person meet and confer with "information regarding the intervenors' responses that we believe will help narrow the issues of concern to plaintiffs," Plaintiffs agreed not to contest an extension to May 15. Pls.' Opp. to Intervenor Defs.' Mot. for an Extension of Time to Respond to Pls.' RFAs, ECF 154, at 4; Olson Decl. in Support of Pls.' Opp. to Intervenor Defs.' Mot. for an Extension of Time to Respond to Pls.' RFAs, ECF 155, ¶ 4.

On May 4, 2017, at the meet and confer, Intervenor Defendants told Plaintiffs that they had reached agreement among Intervenor Defendants on the RFA responses, assured Plaintiffs that they were taking many factual issues out of dispute and narrowing the issues for trial, and committed to Plaintiffs that they would serve and file their formal responses on May 15. ECF 154, at 4; ECF 155, ¶ 5. However, while not coming to the May 4 in-person meet and confer with any specific information or factual responses as previously represented, Intervenor Defendants assured Plaintiffs that they would be happy with the substantial narrowing of issues in dispute when the responses were served on May 15. ECF 154, at 4; ECF 155, ¶¶ 4, 5. Then, on

May 9, 2017, Intervenor Defendants conferred with Plaintiffs and requested a second extension to May 31, 2017, to respond to Plaintiffs' RFAs. ECF 154, at 4; ECF 155, ¶¶ 9, 10.

On May 10, 2017, Intervenor Defendants moved for an Extension of Time to Respond to Plaintiffs' Requests for Admissions. ECF 153. Plaintiffs opposed this motion by arguing Intervenor Defendants had tactically avoided taking a position on the admissions made by Federal Defendants and providing key statements omitted from Intervenor Defendants' motion:

> [O]mitted from their motion is both the fact that this is the second request for an extension on these RFAs and any evidence as to what happened between May 4 and May 9 to require an extension.
>
> What is also omitted is the precise nature of the requested extension. On May 9, 2017, Intervenor Defendants conferred with Plaintiffs by telephone, requesting an extension to May 31, 2017, not June 7, 2017, to respond to Plaintiffs' RFAs. Olson Dec., ¶ 9. The sole reason proffered at that time was Intervenor Defendants no longer had consensus as to the response to the RFAs among the members of Intervenor Defendants. Olson Dec., ¶¶ 9, 10. The point here is that Intervenor Defendants' story supporting their extension request keeps shifting, as a lack of consensus is not mentioned in their moving papers.
>
> Another important point missing from their motion is the many efforts Intervenor Defendants have made to avoid taking a position on the admissions by Federal Defendants. The Court and Plaintiffs began attempting to get Intervenor Defendants to take a position on these admissions since at least the February 7, 2017 Status Conference. ECF 115 at 15-17.

ECF 154, at 3.

This Court extended the due date for Intervenor Defendants' responses to Plaintiffs' RFAs to May 18, 2017. Minute Order, May 12, 2017, ECF 156. At the status conference on May 18, 2017, counsel for Intervenor Defendants made yet a third request for more time to respond to Plaintiffs' RFAs. This third request included two new key admissions: (1) the admissions process would ***not*** narrow the case as Intervenor Defendants had been representing to Plaintiffs and the Court; and (2) Intervenor Defendants would not be able to file a consolidated response, as they had promised the Court they would do when they were granted intervention in the case.[2] Compare Status Conference Transcript, ECF 164, at 33 with Mot. to Intervene Oral Argument Transcript, ECF 53, at 9:18–23.

Ultimately, ***in lieu of responding to any of the RFAs or taking a position on any admissions made by Federal Defendants***, AFPM unceremoniously filed this Motion to Withdraw. The months spent by this Court and Plaintiffs attempting to get Intervenor Defendants to take a position on the admissions proved to be a complete waste of time. The representation that Intervenor Defendants would provide information to "help narrow the issues of concern to plaintiffs" proved hollow and false.

c. Intervenor Defendants' refusal to respond to any discovery placed a significant burden on Plaintiffs and this Court

In addition to their efforts trying to get Intervenor Defendants to take a position on the Federal Government's admissions, Plaintiffs spent substantial time propounding requests for production of documents ("RFPs") on, and conferring on deposition notices with, Intervenor Defendants. This considerable effort was required, in part, because Intervenor Defendants failed to specifically admit or deny nearly all of the allegations in the FAC. Plaintiffs propounded two sets of RFPs on all three Intervenor Defendants (March 7 and March 17, 2017). After receiving objections on one of the RFPs to all Intervenors, and after an all-day meet and confer in Portland on May 4, 2017, Plaintiffs spent an extensive amount of time revising and narrowing the RFPs to address objections raised by Intervenor Defendants. Those revised RFPs to all Intervenor Defendants were served on May 19, 2017. By virtue of this Motion to Withdraw, over three

[2] At oral argument on their Motion to Intervene, counsel for Intervenor Defendants stated that while "there would be three intervenors, but they would be speaking with one voice[,] . . . submitting joint submissions in all circumstances in this case operating essentially as one intervenor." Mot. to Intervene Oral Argument Transcript, ECF 53, at 9:18–23.

months after service of the initial RFPs, Intervenor Defendants take the position that they do not have to respond to a single RFP or provide any witnesses for deposition. The RFP and deposition process is another example of a complete waste of time and resources on the part of this Court and Plaintiffs.

ARGUMENT

While Plaintiffs do not oppose AFPM's withdrawal from the case if it is conditional, such withdrawal must recognize the excessive delay and distraction caused by AFPM's participation in the case. Plaintiffs expended considerable resources addressing issues raised by AFPM, at the Motion to Dismiss, status conference, and discovery stages. Further, this Court expended substantial judicial resources in tackling matters presented by AFPM's participation in this case as a party defendant. As a result, the order permitting AFPM's withdrawal should include provisions addressing the prejudice suffered by this Court and Plaintiffs, as well as anticipate future procedural maneuvers AFPM and its members may present in this litigation.

I. AFPM seeks to avoid its obligations as a party in the case and must provide a justification to the Court in support of its desire to withdraw

AFPM provides no reason for this Court to allow for withdrawal. Instead, AFPM suggests, with more chutzpah than legal authority, that "an intervening party may decide that it no longer wishes to pursue ***currently*** the particular interests and rights that led to intervention in a particular case." AFPM Mot. to Withdraw, ECF 167, at 3 (emphasis added). While permitting withdrawal, this Court should not countenance AFPM's cavalier position on what it means to choose to intervene as a party in litigation.

While AFPM fails to state a reason for its withdrawal, the rationale is obvious: in light of the timing of the motions to withdraw and statements made by counsel for Intervenor Defendants to this Court, AFPM is seeking to withdraw to avoid its obligations as a full party in the case, both to answer the FAC and respond to discovery requests in a manner that meets the requirements of Rule 11.

Just as parties are required to demonstrate why intervention is proper pursuant to Federal Rule of Civil Procedure 24, intervening defendants seeking to withdraw should similarly be required to justify such withdrawal. Indeed, AFPM supported its motion to intervene with an extensive 19-page memorandum, ECF 15, as well as an expert declaration. Friedman Decl., ECF 18. Yet, after months of causing delay and distraction, AFPM now seeks to leave this case without any evidentiary basis, relying solely on a brief of less than 3 pages. ECF 167. Further, AFPM fails to suggest that it should bear any consequences for its aborted participation in this case. Allowing withdrawal without any consequences based on this minuscule record would set bad precedent, tolerating well-resourced third parties to come in and out of litigation, burdening plaintiffs and the court with efforts to thwart or delay litigation involving fundamental constitutional rights.

II. Intervenor Defendants' withdrawal should be conditioned in a manner that does not prejudice Plaintiffs

Plaintiffs would experience extreme prejudice if AFPM was allowed to withdraw without any conditions, particularly given there is no commitment that AFPM or any of its members will not attempt to re-enter the case or file a writ of mandamus to the Ninth Circuit and the Supreme Court as a non-party.[3] AFPM argues that both the decisions to intervene and withdraw from the

[3] Intervenor Defendants' counsel told Plaintiffs previously they would seek writ of mandamus if this Court did not certify the decision on the motions to dismiss for interlocutory appeal. Olson Decl. in Support of Pls.' Opp. to Intervenor Defs.' for an Extension of Time to Respond to Pls.' RFAs, ECF 155, ¶ 7. It would be particularly egregious for AFPM to be allowed to withdraw from this case and avoid discovery and this court's jurisdiction and then move the appellate courts for a writ of mandamus over this very same matter. Such gaming the system should be disallowed.

case are within its sole discretion. AFPM analogizes to a plaintiff dismissing a case: "just as a plaintiff has the right to decide she no longer wishes to pursue a particular claim filed in a particular case, an intervening party may decide that it no longer wishes to pursue currently the particular interests and rights that led to intervention in a particular case." AFPM Mot. to Withdraw, ECF 167, at 3. However, none of the cases AFPM cites in its motion supports this proposition.

In its Motion to Withdraw, AFPM cites *Kourtis v. Cameron*, 419 F.3d 989, 998 (9th Cir. 2005), for the proposition that intervention is a discretionary choice and that parties can choose when they want to be involved in a case. Nevertheless, *Kourtis* is a copyright case, and the court's discussion of intervention is mere dicta, used to explain why the Kourtis were not claim precluded where their "agent" had brought suit previously. Moreover, *Kourtis* is complicated by the Australian citizenship of the plaintiffs and a prior Australian court judgment in their favor. The primary question for the court in *Kourtis* was one of privity of contract for purposes of claim preclusion, rather than discretionary intervention. *Taylor v. Sturgell*, 553 U.S. 880 (2008) distinguishes *Kourtis*, and is discussed further at *infra*, Argument II(c)(iii).

AFPM also cites *Chesapeake Energy Corp. v. Bank of NY Mellon Trust Co.*, No. 1:13-cv-01582, Dkt. 60 (S.D.N.Y. Apr. 1, 2013), and *Dowell v. Bd. of Educ. of Okla. City Pub. Sch.*, 430 F.2d 865, 868 (10th Cir. 1970), for the proposition that intervenors have the right to reevaluate decisions to intervene to determine that they no longer wish to participate. Nevertheless, in *Chesapeake*, the intervenor noteholders moved to withdraw under Rule 21, rather than an unrecognized "parallel" to Rule 24, which AFPM attempts to use in this case. Moreover, the intervenor Noteholder Group in *Chesapeake* was only in the case for thirteen days between its motion to intervene and its motion to withdraw; twenty days from its motion to intervene until the court permitted withdrawal. During this time, the intervenor Noteholder Group only responded to Plaintiff's Complaint and Motion for a Preliminary Injunction — it did not file any motions. Intervention also posed problems for diversity jurisdiction. *See Chesapeake Energy Corp.*, Dkt. 55. Finally, intervenor Noteholder Group "clarified . . . that they will not require service of subpoenas to replace the document requests to which they are already subject, and they will not assert that otherwise appropriate discovery from them will be inappropriate because they have become non-parties. *See id.*, Dkt. 54, at 2.

AFPM also relies on *Dowell*, a case about desegregation of the Oklahoma City Public Schools, for the proposition that AFPM has "the 'right' to intervene [and] . . . to decide that it no longer wishes to participate in a case." AFPM Mot. to Withdraw, ECF 167, at 4. *Dowell*, however, is not about withdrawal but about intervention: the party moving to intervene had participated heavily in the case throughout the litigation. *See Dowell*, 430 F.2d at 868.

AFPM also relies on *Brown v. Detzner*, No. 3:12-cv-00852, Dkt. 58 (M.D. Fla. Apr. 29, 2013), a case in which Congresswoman Corinne Brown sued to restore early voting in Duval County, Florida. In *Brown*, however, the intervenors' motion to withdraw was based on the fact that the elections had already occurred, and they therefore had no more interest in the litigation. *Brown* intervenors, moreover, were involved in the case for less than seven months and filed only a response to the Motion for Preliminary Injunction. *See id.*, Dkt. 35.

AFPM also relies on *South Carolina v. United States*, No. 1:12-cv-00203 (D.D.C. May 24, 2012), in which South Carolina sued the United States for preclearance of their voter identification law under the Voting Rights Act. In *South Carolina*, there were fourteen individual intervenor defendants and four organizational intervenor defendants; only four of the intervenors moved to withdraw, and their motion was granted under Rule 21. The parties before and after withdrawal were substantially the same.

Finally, AFPM relies on *Legal Aid Society of Alameda County v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980), for the proposition that intervention is discretionary and the government's assuming a "substantially different position" allows for modification of intervenor status. *Legal Aid Society*, however, is about intervention rather than withdrawal, and the Chamber of Commerce moved to intervene three times (once at the outset and twice during the General Services Administration portion of the lawsuit). Each time, the Chamber was granted partial intervention (for purposes of opposing government disclosure and appeal of the order granting partial summary judgment). The Ninth Circuit allowed intervention after the government's position changed substantially.

Further, as this Court well knows, a plaintiff cannot unilaterally dismiss its case after a certain point without consequences. Voluntary dismissal of actions by plaintiffs is governed by Federal Rules of Civil Procedure 41(a). Under Rule 41(a)(2), "[e]xcept as provided in Rule 41(a)(1),[4] an action may be dismissed at the plaintiff's request only by court order, *on terms that the court considers proper*. . . . Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice." Fed. R. Civ. P. 41(a)(2) (emphasis added). Thus, per the plain meaning of the Rule, voluntary dismissal of actions by plaintiffs through court order is subject to terms set by the court.

---

[4] Under Rule 41(a)(1), a plaintiff may without court order dismiss an action by filing "notice of dismissal before the opposing party serves either an answer or a motion for summary judgment" or by stipulation. Fed. R. Civ. P. 41(a)(1). This provision is not analogous to AFPM's effort to withdraw because AFPM has already filed answers and motions.

In fact, AFPM's analogy supports Plaintiffs' argument that this Court has the discretion to decide whether AFPM's withdrawal should be with prejudice and to place terms and conditions on AFPM's withdrawal, including, but not limited to, payment of Plaintiffs' attorneys' fees and costs, and an order conditioning future participation in this litigation by AFPM and its members. Assuming the validity of AFPM's analogy between its request to withdraw and the voluntary dismissal of an action by a plaintiff, this Court should likewise grant AFPM's motion to withdraw only on terms that are "proper."

a. AFPM's withdraw from the case should be with prejudice

Under Rule 41, the issue of whether to dismiss an action with or without prejudice is within this Court's discretion. *See Williams v. Peralta Community College Dist.*, 227 F.R.D. 538, 539–40 (N.D. Cal. 2005) (citing *Hargis v. Foster*, 282 F.3d 1154 (9th Cir. 2002), *amended by* 312 F.3d 404, 406 (9th Cir. 2002)). This position is derived from Rule 41(a)(2)'s "on terms that the court considers proper" language. *See Burnette v. Godshall*, 828 F. Supp. 1439, 1443 (N.D. Cal. 1993), *aff'd sub nom. Burnette v. Lockheed Missiles & Space Co.*, 72 F.3d 766 (9th Cir. 1995); *Hargis v. Foster*, 312 F.3d 404, 412 (9th Cir. 2002).

To determine whether an action should be dismissed with prejudice, the court asks whether "it would be inequitable or prejudicial to defendant to allow plaintiff to refile the action." *Hemstreet v. Duncan*, No. CIV. 07-732-ST, 2008 WL 2167137, at *2 (D. Or. May 21, 2008) (quoting *Burnette*, 828 F. Supp. at 1443). Here, this Court should ask whether allowing AFPM and its members the ability to later participate in this action, by again seeking party status, by filing writs of mandamus, or by participating as *amicus curiae*, would prejudice Plaintiffs and frustrate judicial economy and justice. The obvious answer is the later participation in this case by AFPM and its members would by inequitable and prejudicial to Plaintiffs and, as with their earlier participation in this case, continue to frustrate judicial economy and justice.

Equity demands that AFPM's withdrawal be with prejudice where AFPM repeatedly lost its motions for dismissal, filed a wholly inadequate Answer, gave lip service to the discovery process, and then waited until it was faced with admitting key facts of the case, which would assist Plaintiffs in obtaining a successful ruling on the merits, before seeking to withdraw. *See Brooks v. State Bd. of Elections*, 173 F.R.D. 547, 549–50 (S.D. Ga. 1997) (holding that equity requires dismissal with prejudice "where the plaintiff waited until the defendant is on the verge of triumph to move for a Rule 41(a)(2) dismissal.").

The factors this Court should consider are those considered when a plaintiff seeks to dismiss a case: "(1) the defendant's effort and expense in preparing for trial, (2) excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, [and] (3) insufficient explanation of the need to take a dismissal." *Hemstreet v. Duncan*, No. CIV. 07-732-ST, 2008 WL 2167137, at *2 (D. Or. May 21, 2008) (quoting *Williams*, 227 F.R.D. at 540) ("Another significant factor to consider is the extent to which any prejudice to defendant can be mitigated by the imposition of conditions.").

As described above, Plaintiffs have expended significant time and resources in responding to AFPM's motions and objections in this case and in their efforts to expeditiously prepare for trial against AFPM, when AFPM refused to take any position on the core facts of this case. AFPM also sought to delay this case, stay this case, and frustrate Plaintiffs' discovery attempts, all of which demonstrated a lack of diligence in moving the case forward to resolution. Further, in its motion to withdraw, AFPM fails to explain its need to withdraw from the case, and should be required to go on record with its explanation.

In order to intervene, AFPM was required to establish that this case could result in factual or legal determinations that would have a *stare decisis* effect on the interest or available remedies of AFPM and its members in other litigation. *United States v. Oregon*, 839 F.2d 635, 638–39 (9th Cir. 1988); *Greene v. United States*, 996 F.2d 973, 977–78 (9th Cir. 1993). Because AFPM represented that it had made this showing on behalf of itself and its members, should this Court allow AFPM to withdraw from this case, such withdrawal should be with prejudice, both for AFPM and each of AFPM's members. *See* Decl. of Julia Olson Supporting Pls.' Resp. to API's Mot. to Withdraw ("Olson Decl.") ¶ 3, Exh. 1 (listing AFPM members).[5] Further, because AFPM has withdrawn after motion practiced commenced, the legal determinations made to date should have a *stare decisis* effect on AFPM's interest or available remedies in other litigation. Beyond dismissing actions with prejudice, trial courts have conditioned dismissals without prejudice on a plaintiff's agreement to enter covenant to not sue in the future. *See Goldlawr, Inc. v. Shubert*, 32 F.R.D. 467 (S.D.N.Y 1962); *Radian Asset Assur., Inc. v. College of the Christian Bros. of New Mexico*, 274 F.R.D. 683 (D.N.M. 2011); *United States v. Outboard Marine Corp.*, 789 F.2d 497 (7th Cir. 1986). Without such preclusive effect, there is no telling when or how AFPM or its members will again seek to helicopter into this case.

Withdrawal with prejudice is one of the penalties that AFPM and its members should bear. There must be consequences for AFPM's repeated unwillingness to take a position on the factual allegations in the FAC, both in its Answer and in its discovery responses. For example, despite being granted an extension of time "to canvas the appropriate personnel to directly answer the allegations in the complaint," Case Mgmt. Conf. Transcript, ECF 100, at 7:12–23.

---

5 AFPM should be required to disclose its members to the Court.

AFPM's Answer frivolously repeated the refrain of lack of sufficient information or knowledge to admit or deny many allegations of fact that: (1) are based on federal government statements in publicly available documents easily uncovered by a simple Google search; (2) have been long known, and previously admitted, by AFPM and/or its members; and (3) could be admitted with slight alterations in the averments, as Federal Defendants did in their answer. The repetitious, baseless assertions of "lack of sufficient information and knowledge" in response to the FAC's allegations are but one example of how AFPM wasted the valuable time and resources of this Court and Plaintiffs, particularly given the underlying urgency of the issues raised in this case.

Under Rule 11, counsel must "certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well grounded in fact." *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 393 (1990). A "reasonable inquiry" conducted by Intervenor Defendants' counsel would have revealed that AFPM and many of its members, on whose behalf AFPM intervened,[6] possess sufficient knowledge to respond to portions of the factual allegations in Plaintiffs' FAC. AFPM has been aware of the prevailing science on climate change for over 20 years and has had knowledge of the issues presented in admissions by Federal Defendants as evidenced through AFPM's own activities.

AFPM's Board of Directors consists of many high-ranking officers and representatives of AFPM's members. Accordingly, documents, records, and other information in the possession of, accessible to, and within the knowledge of AFPM's members should be attributable to AFPM and accessible to AFPM by reasonable inquiry. As discussed below, documents and records of

---

[6] *See* Intervenor Defs.' Mot. to Intervene, ECF 14, at 3 ("[i]f Plaintiffs succeed, each of the Proposed Intervenor Defendants' *members* will be harmed in various ways.") (emphasis added); *see also* Memo. in Support of Mot. to Intervene, ECF 15, at 11–15 (arguing that relief sought by Plaintiffs will harm Intervenor Defendants' members).

AFPM's members contain ample information about the FAC's allegations regarding the realities of climate change. The existence of these documents, their ready availability, and the imputation to AFPM of the knowledge they reflect establishes that AFPM failed to conduct a reasonable inquiry with respect to its Answer to the FAC.

AFPM held conferences, under its previous name — the National Petrochemical and Refiners Association — at which professors admitted that global warming is "real & man-made," conceding that global temperatures will likely increase by 2.6º C by 2100, and arguing that sea levels will rise, but not catastrophically, such that funding should be directed to researching cures for diseases such as AIDS and malaria rather than climate change. Olson Decl. ¶ 10, Exh. 3.

AFPM, through its sponsorship of fundraising for organizations such as the Competitive Enterprise Institute ("CEI"), has substantial knowledge of facts regarding energy and environmental issues, because CEI has "been working on energy and environmental issues longer than other" Washington, D.C. groups. Olson Decl. ¶ 9, Exh. 2.

Moreover, AFPM officially called Oregon's attempts to create low carbon fuel standards "unfortunate" and stated that carbon dioxide is not a pollutant. Olson Decl. ¶¶ 11, 12, Exhs. 4, 5.

AFPM, through its member companies and Board of Directors, has substantial knowledge of the facts underlying Plaintiffs' factual allegations. Of concern, many of the members of AFPM maintain corporate positions on climate change that are sharply at odds with the Answer filed by AFPM. Counsel for Intervenor Defendants either ignored these positions or failed to conduct a reasonable inquiry into the knowledge and information of at least the following AFPM members.

ExxonMobil Corporation, an AFPM member,[7] possesses substantial knowledge of the facts underlying Plaintiffs' allegations. For example, on November 12, 1982, M. B. Glaser, Exxon's Manager of Environmental Affairs Programs, distributed extensive briefing material on the CO_2 Greenhouse Effect to Exxon management. The materials included Table 4[8] (*infra*), which demonstrates a sophisticated understanding of how continued global emissions incrementally lead to persistent increases in atmospheric CO_2 concentrations and average temperature increases.

TABLE 4

ESTIMATED ATMOSPHERIC CO_2 CONCENTRATION AND AVERAGE TEMPERATURE INCREASE 21st CENTURY STUDY--HIGH CASE

Year	Emitted, GtC Incremental	Emitted, GtC Cummulative	Stored in Atmosphere, GtC Incremental	Stored in Atmosphere, GtC Cummulative	Atmospheric Concentration, ppm Incremental	Atmospheric Concentration, ppm Cummulative	Average Temperature Increase, °C
1979	--	--	--	715	--	337	0
1990	69.3	69.3	37.1	752	17.5	355	0.22
2000	77.2	146.5	41.3	793	19.5	374	0.45
2015	137.5	284.0	73.6	867	34.7	409	0.84
2030	163.3	447.3	87.4	954	41.2	450	1.25
2050	263.5	710.8	141.0	1095	66.5	516	1.84
2080	490.6	1201.4	262.5	1358	123.7	640	2.78
2090	191.3	1392.7	102.3	1160	48.2	688	3.09

-24-

Moreover, Exxon acknowledged the potential impacts of climate change upon human health in a 1996 presentation document and advocated for promotion of "relative

7 *See Membership Directory*, American Fuel & Petrochemical Manufacturers, https://www.afpm.org/membership-directory (last visited June 2, 2017).

8 M. B. Glaser, *CO_2 "Greenhouse" Effect*, Exxon Research and Engineering Company (Nov. 12, 1982), https://insideclimatenews.org/sites/default/files/documents/1982%20Exxon%20Primer%20on%20CO2%20Greenhouse%20Effect.pdf.

risk" of disease models to discount worries over the impact of climate on human health. Decl. of Julia Olson Supporting Pls.' Resp. to API's Mot. to Withdraw.

Shell Oil Company is an AFPM member.[9] Shell's parent company, Shell International BV, has recognized the need to achieve net-zero emissions to "stabilise the climate" and has recognized that "[e]ven if annual global CO_2 emissions remain steady at their current level, the cumulative emissions consistent with a rise of 1.5ºC could be reached as early as 2028." Decl. of Julia Olson Supporting Pls.' Resp. to API's Mot. to Withdraw.

BP America, Inc. is an AFPM member.[10] Its parent company, BP p.l.c., "recognizes that the existing trend of increasing greenhouse gas emissions worldwide is not consistent with limiting the global average temperature rise to 2° C or lower."[11]

AFPM sought to try to frustrate Plaintiffs' attempts to secure their constitutional rights, without ever having to go on record about either the science of climate change or the role of AFPM and its members in working with Federal Defendants to perpetuate the climate crisis. For all of these reasons, AFPM's withdrawal should be with prejudice, precluding AFPM and its members from any participation in this case going forward.

b. This Court should condition AFPM's withdrawal upon AFPM's dismissing of all its pending motions and objections

---

[9] *See Membership Directory*, American Fuel & Petrochemical Manufacturers, https://www.afpm.org/membership-directory (last visited June 2, 2017).

[10] *See Membership Directory*, American Fuel & Petrochemical Manufacturers, https://www.afpm.org/membership-directory (last visited June 2, 2017).

[11] BP, *The energy challenge and climate change: BP Sustainability Report 2015* at 2, http://www.bp.com/content/dam/bp/pdf/about-bp/energy-challenge-climate-change.pdf.

This Court should condition AFPM's withdrawal upon AFPM's voluntary dismissal of all the pending motions and objections which AFPM has propounded to date. Allowing AFPM to withdraw while allowing AFPM's motions and objections to proceed to resolution would present an inequitable result to Plaintiffs because it would allow AFPM to obtain favorable rulings while protecting AFPM from the potential consequences of litigation.

c. In addition to allowing AFPM's withdrawal only with prejudice and AFPM's dismissal of all its motions and objections, this Court should place other terms and conditions on AFPM's withdrawal from this case

Just as "approval of a motion to dismiss under Rule 41(a)(2) lies within the sound discretion of this court, and includes weighing all relevant equities," so too does the court's approval of a motion to withdraw. *See N.W. Envtl. Def. Ctr. v. Allen*, CIV. 05-1279-AA, 2007 WL 1746333, at *4 (D. Or. June 13, 2007) (Aiken, J.) (internal quotations omitted) (discussing dismissing an action "with conditions"). "[T]he district court must weigh the relevant equities and do justice between the parties in each case, imposing such costs and attaching such conditions to the dismissal as are deemed appropriate." *Burnette v. Godshall*, 828 F. Supp. 1439, 1443–44 (N.D. Cal. 1993), *aff'd sub nom. Burnette v. Lockheed Missiles & Space Co., Inc.,* 72 F.3d 766 (9th Cir. 1995). As one court stated in response to a plaintiff's request to dismiss a case:

> this plaintiff has engaged in extensive maneuvering to maintain in this court the very actions it now wishes to discontinue. The argument plaintiff has presented throughout this maneuvering is that dismissal of these actions would cause it serious hardship because the causes sued upon would then be barred by the statute of limitations. . . In view of these facts, it seems appropriate to provide that plaintiff bear reasonable costs and counsel fees for the extensive litigation to which defendants have been subjected.

Goldlawr, Inc. v. Shubert, 32 F.R.D. 467, 470 (S.D.N.Y. 1962).

i. This Court has the inherent power to order an award of attorneys' fees to Plaintiffs, given Intervenor Defendants' conduct in this case

As a condition of its withdrawal at this late stage in the litigation, Plaintiffs respectfully request this Court award reasonable attorneys' fees directly incurred by Plaintiffs as a result of AFPM's bad-faith litigation tactics under the common-law exceptions to the American Rule that permit an award of attorneys' fees in this situation. The Supreme Court has recently clarified that federal courts have inherent authority to sanction litigants for "bad-faith conduct by ordering [them] to pay the other side's legal fees. . . . A district court has broad discretion to calculate fee awards under the standard," which limits fees to those "incurred solely because of the misconduct." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1183–84 (2017). Alternatively, Plaintiffs respectfully reserve their right to seek fees against AFPM at the close of the litigation for such tactics if Plaintiffs prevail on the merits.[12] Such an award is in the interests of justice and is necessary to promote the interests of fairness. Such an order would address the attorneys' fees that Plaintiffs incurred solely because of AFPM's improper participation in this case and would be compensatory, rather than punitive. *See Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017) (quoting *Mine Workers v. Bagwell*, 512 U.S. 821, 829 (1994)) (approving of fee awards which redress the wronged party "for losses sustained"). Having chosen to intervene over the objections of Plaintiffs and taken positions that have prolonged and delayed this litigation, it is inappropriate for AFPM to withdraw and remove itself from liability for attorneys' fees to which Plaintiffs are entitled, either now or at the close of this litigation.

---

[12] If this Court determines that attorneys' fees attributable to AFPM's participation in this case and subsequent withdrawal are warranted, Plaintiffs will file a separate motion for attorneys' fees, with supporting declarations, at the time and in the manner designated by this Court.

“An award of fees to the prevailing party is proper if (1) authorized by statute or, (2) the court finds that the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” *Beaudry Motor Co. v. Abko Properties, Inc.*, 780 F.2d 751, 756 (9th Cir. 1986); *see also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258–59 (1975). The United States Supreme Court has determined that the American Rule governing the award of attorneys' fees

> ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization[; however,] federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require. Indeed, the power to award such fees "is part of the original authority of the chancellor to do equity in a particular situation," and federal courts do not hesitate to exercise this inherent equitable power whenever "overriding considerations indicate the need for such a recovery."

Hall v. Cole, 412 U.S. 1, 4–5 (1973) (citations omitted).

“In exceptional cases, the but-for standard even permits a trial court to shift all of a party's fees, from either the start or some midpoint of a suit, in one fell swoop.” *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1187 (2017). An award of attorneys' fees under the “bad faith exception” to the American Rule applied in the Ninth Circuit should be imposed in this case because this case presents an “exceptional” situation and an award of attorneys' fees is required “for dominating reasons of justice.'” *Beaudry Motor Co.*, 780 F.2d at 756. (quoting *United States v. Standard Oil Co.*, 603 F.2d 100, 103 (9th Cir. 1979); *see Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. at 1188 (noting an award for “brazenly unethical efforts”). The fees incurred by the plaintiffs in this case “would not have been incurred except for the misconduct.” *Goodyear Tire*, 137 S. Ct. at 1188. “[I]f a court finds ‘that fraud has been practiced upon it, or that the very temple of justice has been defiled,’ it may assess attorney's fees against the responsible party, as it may when a party ‘shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991) (citations and quotations omitted). "Mere recklessness does not alone constitute bad faith; rather, an award of attorney's fees is justified when reckless conduct is 'combined with an additional factor such as frivolousness, harassment, or an improper purpose.'" *Rodriguez v. U.S.*, 542 F.3d 704, 709 (9th Cir. 2008). "It is clear that bad faith supporting an award of attorneys' fees may be found in conduct . . . occurring during the course of the action." *Int'l Union of Petroleum & Indus. Workers v. W. Indus. Maint., Inc.*, 707 F.2d 425, 428 (9th Cir. 1983). This Court has the "inherent equitable power" to award attorneys' fees to Plaintiffs in this case in light of AFPM's motion to withdraw on the eve of a court-ordered response to Plaintiffs' outstanding motions for discovery, including requests for admissions, requests for production of documents, and depositions. *Beaudry Motor Co.*, 780 F.2d at 756.

Further, in deciding whether to award costs to Plaintiffs, this Court should consider the excessive and duplicative expenses incurred as a result of AFPM's participation in this litigation. *See Santa Rosa Mem'l. Hosp. v. Kent*, 15-16650, 2017 WL 1488263, at *2 (9th Cir. Apr. 26, 2017) (quoting *Williams v. Peralta Community College Dist.*, 227 F.R.D. 538, 539–40 (N.D. Cal. 2005)). Those costs incurred for the preparation of work product rendered useless by the dismissal should be awarded as a condition of voluntary dismissal. *See Briles v. Loomis Group, Inc.*, CIV. 08-1290-AA, 2009 WL 563048, at *1 (D. Or. Mar. 3, 2009) (Aiken, J.) (quoting *Koch v. Hankins*, 8 F.3d 650, 652 (9th Cir. 1993)).

As detailed above, AFPM's conduct in this litigation justifies a finding of bad faith. Its decision to withdraw, nearly two years after it moved to intervene over the objections of Plaintiffs and on the very day of its required response to crucial discovery suggests that AFPM's intervention in this case was solely for the purpose of harassment and delay. AFPM's intransigent inability to faithfully fulfill routine obligations of a party in litigation demonstrates disrespect for this Court's time and resources and illuminates that AFPM's participation in this case has been in bad faith.

ii. This Court has the power to preclude AFPM and its members from attempting to further litigate the claims in this case

As a condition of its withdrawal at this late stage in the litigation, Plaintiffs respectfully request this Court preclude AFPM and its members from litigating the claims in this case. The general rule is that because nonparties have not had a "full and fair opportunity to litigate" claims and issues in a case, such nonparties should not be precluded from litigating claims raised in prior suits. *See Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008); *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996). In this case, however, AFPM, on behalf of itself and its members, has had a "full and fair opportunity to litigate," and has chosen to withdraw by its own accord.

There are six exceptions to the general rule against nonparty preclusion, three of which would apply to AFPM and its members should it seek to relitigate these claims. The Supreme Court clarifies in *Taylor v. Sturgell* that nonparties can be bound: (1) by agreement, (2) through privity with a party to the lawsuit, (3) through adequate representation by a party to the lawsuit, (4) by control over the litigation, (5) against relitigating through a proxy, and (6) through a statutory scheme. 553 U.S. at 893–95. In this case, exceptions (3), (4), and (5) apply directly.

First, this Court should bind AFPM and its members to the results of this litigation because AFPM and its members are "adequately represented by someone with the same interests who was a party to the suit." *Taylor*, 553 U.S. at 894 (citation omitted) (internal quotation marks omitted); *see Headwaters Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1053 (9th Cir. 2005). In AFPM's motion to intervene, AFPM argued that it was entitled to intervene as of right under Rule 24(a) because the interests of AFPM's members were not adequately protected by Federal

Defendants. This Court granted intervention, and AFPM had full opportunity to adequately represent its interests and the interests of its members. Moreover, AFPM has allegedly made public statements since filing its motion to withdraw, that its interests are adequately protected by Federal Defendants, essentially admitting that AFPM no longer meets the inadequate representation requirement of Rule 24(a). *See* Decl. of Julia Olson Supporting Pls.' Resp. to API's Mot. to Withdraw.

Second, this Court should bind AFPM to the results of this litigation because AFPM, through its intervention in the case, "assumed control" over this litigation. *Taylor*, 553 U.S. at 895; *see Montana v. United States*, 440 U.S. 147, 154 (1979). AFPM and its members have had "the opportunity to present proofs and argument, and have, therefore, had their "day in court." 1 Restatement (Second) of Judgments § 39, cmt. a (Am. Law Inst. 1980); *see Taylor*, 553 U.S. at 895.

Third, this Court should bind AFPM and its members to the results of this litigation because AFPM has brought suit in this case "as the designated representative" of numerous potential litigants. If AFPM and its members are not bound by the judgment in this case, the results — relitigation through AFPM or its members — would run amok of the fifth exception to the presumption against nonparty preclusion by allowing relitigation through proxies. *See Taylor*, 553 U.S. 895; *Chicago, R.I. & P.R. Co. v. Schendel*, 270 U.S. 611, 620, 623 (1926); 18A Charles Alan Wright et al., Federal Practice and Procedure § 4454 (2d ed. 2017).

Precluding AFPM and its members from relitigating these claims in a future lawsuit "protects [its] adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. at 153–54. In this case, Plaintiffs, as

AFPM's adversaries, have already dealt with the vexatious expense accompanying AFPM's participation in this case, such as responding to and defending against AFPM's motion to dismiss and preparing discovery against AFPM due to AFPM's refusal to take a position in its Answer. Moreover, AFPM has already acted in a manner that wastes judicial resources, changing its position on timing, whether it could respond in a joint manner with the other Intervenor Defendants, and failing to take a position on climate science despite readily available data and statements previously made by AFPM and its members. Furthermore, precluding the future participation in this case or other litigation with the same claims by AFPM and its members fulfills the goals of the presumption against nonparty preclusion: here, AFPM indeed has a "full and fair opportunity to litigate" and is instead moving to withdraw on the verge of meaningful discovery. *Cf. Taylor*, 553 U.S. 892.[13]

CONCLUSION

[13] The equitable discretion of the court is broad in crafting appropriate conditions for withdrawal. In some instances, courts have even required parties to respond to already propounded discovery requests, when a party seeking to exit a case does so "for the purpose of evading [its] discovery obligations." *Opperman v. Path, Inc.*, No. 13-cv-00453-JST, 2015 U.S. Dist. LEXIS 171564, *14 (N.D. Cal. Dec. 22, 2015). Courts consider whether "it would be unfair to allow [defendant] to 'walk away from' [its] discovery obligations when [it] may have 'information pertinent to the case.'" *Id.* (finding "it appropriate to condition Sandiford's voluntary dismissal on requiring further responses to the requests for production and interrogatories already propounded by Defendants"); *see also Alliance for Global Justice v. District of Columbia*, 2005 U.S. Dist. LEXIS 2855, *9 (D.D.C. Feb. 7, 2005) ("It bears emphasis that plaintiffs, represented by sophisticated counsel, surely had to appreciate when they began this lawsuit that they would have to undertake significant discovery obligations. It is simply unfair to allow plaintiffs to walk away from these obligations when it appears that they have information pertinent to the case that they initiated and that defendants must continue to defend."); *Ellis v. Merrill Lynch & Co.*, Civil Action Nos. 86-2865, 86-3375, 1989 U.S. Dist. LEXIS 14720, at *15, *16 (E.D. Pa. Dec. 6, 1989) (ordering withdrawing plaintiffs to comply with already propounded discovery requests and ordering withdrawing plaintiffs to pay reasonable attorneys' fees to defendants).

AFPM should never have chosen to intervene in this case. Once it intervened, AFPM should not have employed the numerous frivolous techniques that resulted in substantial delay and disruption of this litigation. AFPM should be allowed to withdraw, ***with conditions***. An order permitting withdrawal should recognize Plaintiffs' investment of considerable resources in addressing issues raised by AFPM, and the apparent squandering of judicial resources as a result of AFPM's participation. In permitting AFPM to withdraw, this Court should order the following[14]:

a. AFPM's withdrawal should be with prejudice, finding that AFPM no longer meets the requirements of FRCP 24;
b. AFPM's withdrawal should include the dismissal of all pending AFPM motions and objections in this case;
c. AFPM should be required to pay attorneys' fees and costs of counsel for Plaintiffs that are attributed to AFPM's participation in this case;
d. Because AFPM has withdrawn after motion practiced commenced, the legal determinations made to date should have a *stare decisis* effect on AFPM's interest or available remedies in other litigation. *United States v. Oregon*, 839 F.2d 635, 638–39 (9th Cir. 1988); *Greene v. United States*, 996 F.2d 973, 977–78 (9th Cir. 1993); and
e. AFPM and its members should be precluded from participating in this case as parties. As a result, AFPM should file with this Court a list of its members, both at the time AFPM moved to intervene and at the time AFPM moved to withdraw. Both AFPM and each of these members should be precluded from making any future filings in this case absent leave of this Court, which leave should only be granted if AFPM or such

---

[14] These same conditions should be placed on each of the three Intervenor Defendants.

member presents evidence as to its role, if any, in the decision to intervene, the decision to admit or deny allegations in the FAC, the various decisions to respond to discovery, and the decision to withdraw. Further, any future filing by AFPM or its members should be limited to *amicus curiae* participation if the foregoing conditions are met.

DATED this 8th day of June, 2017, at Eugene, Oregon.

Respectfully submitted,

/s/ Julia A. Olson

JULIA OLSON (OR Bar 062230)
JuliaAOlson@gmail.com
WILD EARTH ADVOCATES
1216 Lincoln St.
Eugene, OR 97401
Tel: (415) 786-4825

PHILIP L. GREGORY (*pro hac vice*)
pgregory@cpmlegal.com
COTCHET, PITRE & McCARTHY, LLP
San Francisco Airport Office Center
840 Malcolm Road
Burlingame, CA 94010
Tel: (650) 697-6000
Fax: (650) 697-0577

DANIEL M. GALPERN (OR Bar 061950)
dan.galpern@gmail.com
LAW OFFICES OF DANIEL M. GALPERN
2495 Hilyard Street, Suite A
Eugene, OR 97405
Tel: (541) 968-7164

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Supporting Memorandum complies with the applicable word-count limitation under LR 7-2(b) because it contains 33 pages and 10,311 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

/s/ Julia A. Olson

JULIA OLSON (OR Bar 062230)
JuliaAOlson@gmail.com
WILD EARTH ADVOCATES
1216 Lincoln St.
Eugene, OR 97401
Tel: (415) 786-4825